Supreme Court, U.S.
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No. 85-471

In The

Supreme Court of the United States

October Term, 1985

STEVEN RICHARDS NORDGREN, DOUGLAS YOAKAM, RAY DODGE, and JOHN C. BOLSINGER,

Petitioners,

v.

WILLIAM MILLIKEN, Director, Utah Division of Corrections, S. L. DIBELL, BARBARA R. BURNETT, REV. FRANCE A. DAVIS, DR. JEAN B. WHITE, DR. BART WOLTHUIS, M. H. FLORES, members of the Board of Corrections of Utah, LARRY MORRIS, Warden of the Utah State Prison, and STATE OF UTAH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID L. WILKINSON
Attorney General of Utah
WILLIAM T. EVANS, Counsel of Record
Assistant Attorney General
BRENT A. BURNETT
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-7642

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTION PRESENTED FOR REVIEW

Whether the court below properly refused to extend the effect of this Court's decision in *Bounds v. Smith,* to require the State of Utah to provide for the assistance of counsel beyond the completion and filing of a complaint.

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STATEMENT OF THE CASE

In an order, dated October 3, 1985, the United States Court of Appeals for the Tenth Circuit permitted the appellants' (petitioners') untimely petition for rehearing, with suggestion for rehearing en banc to be filed as of June 6, 1985.

In a further order, dated October 18, 1985, the United States Court of Appeals for the Tenth Circuit denied the appellants' (petitioners') petition for rehearing and suggestion for rehearing en banc.

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SUMMARY OF ARGUMENT

Certiorari review of this case is not warranted. No court of appeals "has rendered a decision in conflict with the decision of" the Tenth Circuit that assistance of counsel in the preparation and filing of a meaningful complaint satisfies the constitutional needs of the petitioners to meaningful access to the courts. Nor has the Tenth Circuit or the District Court of Utah "so far departed from the accepted and usual course of judicial proceedings" in this case, "as to call for an exercise of this Court's power of supervision." S.Ct. Rule 17.

Petitioners seek a Writ, claiming that the decision of the court below is in conflict with certain rulings of the United States Courts of Appeals for the Fifth and Eleventh Circuits. This is not the case. In fact, the United States Circuit Court of Appeals for the Tenth Circuit, in deciding

the instant matter, relied upon decisions from the Fifth Circuit. The cases cited by the petitioners are not on point and do not speak to the question at issue.

ARGUMENT

In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981), the Court did not address the question at issue in this matter. *Bonner* did not involve the quality or quantity of assistance that an inmate should receive in the preparation and filing of a complaint. In *Bonner,* the district court, on its own motion, dismissed the plaintiff-inmate's complaint without prejudice. This action was taken for the convenience of the court and in the belief that the plaintiff could refile after he had been released from custody if he so desired.

In reversing, the Eleventh Circuit held that the grounds for the dismissal were inadequate. In so doing, the court held that inmate access to the courts is not adequate, effective and meaningful under ***Bounds v. Smith,*** 430 U.S. 817 (1977) if a complaint that states a legally sufficient claim within the jurisdiction of the court is subject to dismissal on grounds of convenience to courts and litigants. 661 F.2d 1206, 1212. At no time did the court address the question of whether the defendant city should be required to provide the assistance of counsel beyond the filing of a meaningful complaint.

In *Morrow v. Harwell,* 768 F.2d 619 (5th Cir. 1985), the court held that the severely restricted access to legal

books provided by the McLennan County Jail did not provide the inmates of that jail meaningful access to court. The Fifth Circuit was not presented with the question of whether the defendant county jail should be required to provide the assistance of counsel beyond the filing of a meaningful complaint.

No decision by any of the United States Circuit Courts of Appeals is in conflict with the decision of the Tenth Circuit in this matter. In fact, the Tenth Circuit in deciding this action cited a decision of the United States Circuit Court of Appeals for the Fifth Circuit that reached the same result.

In *Cruz v. Hauck,* 627 F.2d 710 (5th Cir. 1980), the district court had held that it's appointment of counsel to assist inmates when it determined a hearing on the complaint was necessary satisfied the need for meaningful access to the courts. In rejecting this position, the Fifth Circuit held that this is not sufficient because the right to meaningful access to the courts means that "inmates are entitled to either access to legal materials or access to counsel for assistance in *filing* habeas corpus and civil rights actions." 627 F.2d 710, 721 n. 22.

The right of access to the courts set forth in *Bounds* should not be extended so as to require special assistance to inmates further than the initial pleading stage. If such assistance is needed in a particular case, the district court can appoint counsel to assist the indigent under 28 U.S.C. § 1915(d). *McCarthy v. Weinberg,* 753 F.2d 836 (10th Cir. 1985), *Merritt v. Faulkner,* 697 F.2d 761 (7th Cir. 1983) and *Ulmer v. Chancellor,* 691 F.2d 209 (5th Cir. 1982).

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CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the decision of the United States Circuit Court of Appeals for the Tenth Circuit.

Respectfully submitted,

DAVID L. WILKINSON
Attorney General of Utah
WILLIAM T. EVANS, Counsel of Record
Assistant Attorney General
BRENT A. BURNETT
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-7642

Counsel for Respondents